SUPREME COURT, U. S. | FILE
MAY 11
MICHAEL RODAK,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1286

---

WADLEIGH-MAURICE, LTD. and WARNER BROS., INC.,
*Petitioners,*

vs.

THOMAS TAGGART,
*Respondent.*

---

## Response to Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

FARLEY & FARLEY,
A Professional Corporation,
112 South Main Street,
Orange, New Jersey 07050

ZAZZALI & ZAZZALI,
A Professional Corporation,
17 Academy Street,
Newark, New Jersey 07102

*Attorneys for Respondent,*

CHARLES J. FARLEY, JR.
JAMES R. ZAZZALI AND
LAWRENCE A. WHIPPLE, JR.
*Of Counsel and*
*On the Brief*

N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030

# TABLE OF CONTENTS

Counter-Statement of Facts ..... 1

ARGUMENT:

POINT I: The Court of Appeals properly reversed the District Court's grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ..... 3

A. Summary judgment was not appropriate in that there were disputed issues of material fact .... 3

B. Respondent's action for invasion of privacy does not deter petitioners from exercising their rights to freedom of speech under the First Amendment ..... 6

POINT II: The doctrine of "constitutional fact" should not be invoked until there has been a plenary record of the disputed factual issues ..... 9

Conclusion ..... 10

CASES CITED:

Addickes v. S. H. Kress Co.,
398 U.S. 144 (1970) ..... 3

Firestone v. Time, Inc.,
460 F.2d 712, cert. denied, 403 U.S. 875
(5th Cir. 1972) ..... 9

Grant v. Esquire Magazine,
367 F. Supp. 876 (S.D.N.Y. 1973) ..... 5

Near v. Minnesota,
283 U.S. 697 (1931) ..... 6

New York Times v. Sullivan,
376 U.S. 254 (1964) ..... 6, 9

TABLE OF CONTENTS

CASES CITED:

Rosenbloom v. Metromedia,
403 U.S. 29 (1971) ..... 6, 7, 8

Sartor v. Arkansas Natural Gas Corp.,
321 U.S. 620, reh. denied 322 U.S. 767 (1944) .... 3

Taggart v. Wadleigh-Maurice, Ltd.,
489 F.2d 434 (3rd Cir. 1973) ..... 4

Time, Inc. v. Hill,
385 U.S. 374 (1964) ..... 7

UNITED STATES CONSTITUTION:

First Amendment ..... 5, 6, 7, 8

RULE CITED:

Rule 56 ..... 3

## COUNTER-STATEMENT OF FACTS

Respondent, Thomas Taggart, is an employee of Port-O-San, a New Jersey Corporation engaged in the business of furnishing and servicing portable latrines. In August of 1969, respondent was dispatched by Port-O-San to Bethel, New York, to service latrines installed by his employer at the Woodstock Music and Arts Festival (commonly known as "Woodstock Festival") which was promoted by petitioner, Wadleigh-Maurice, Ltd. It was respondent's responsibility to empty and clean certain Port-O-San latrines.

As respondent was in the process of performing his necessary though not necessarily pleasant employment, he was approached by agents of the petitioner. These agents lured respondent into a discussion with them and proceeded to tape and film the ensuing conversation. Thereafter, the film and the sound track were edited and inserted into the film "Woodstock" which was produced by petitioner, Warner Bros., Inc., and released to the public for commercial profit-making purposes. The segment of the film in which respondent appeared produced a humiliating effect on respondent. Although critics have considered this portion of the film to be a masterpiece in comic relief, the distribution of this film to movie theatres throughout this country has caused respondent to suffer mental anguish, embarrassment, harassment and public ridicule.

Respondent, while acknowledging his awareness of the presence of "home movie type cameras" in the area, never knew that his conversation with petitioner's agents was being recorded nor that he was being photographed and exploited for the benefit of petitioner. In short, respondent was "drawn-out" by the agents of Wadleigh-Maurice Ltd., and made an involuntary and uncompensated performer in

a commercially motivated film enterprise. He was not a participant in a newsworthy event, and, hence, is entitled to maintain this suit for invasion of privacy.

## ARGUMENT

### POINT I

**The Court of Appeals properly reversed the District Court's grant of summary judgment pursuant to *Rule* 56 of the Federal Rules of Civil Procedure.**

**A. *Summary judgment was not appropriate in that there were disputed issues of material fact***

This Court has long noted that summary judgment is appropriate only in limited circumstances.

> "*Rule* 56 [of the Federal Rules of Civil Procedure] authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is [and] that no genuine issue remains for trial. . . . " *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 *reh. denied* 322 U.S. 767 (1944).

The party moving for summary judgment is held to a strict standard for satisfying his burden of proof, *Sartor, supra*, excluding any doubt as to the existence of a genuine issue of fact, *Addickes v. S. H. Kress Company*, 398 U.S. 144 (1970).

In accordance with these pronouncements, the United States Court of Appeals for the Third Circuit reversed the grant of summary judgment by the United States District Court for the District of New Jersey. This decision was correct and should be affirmed. The basic and fundamental issue raised below is one not aptly suited for summary judgment determination: whether a worker who is not a participant in a newsworthy event can be deliberately drawn-out as a performer in a commercial film without warning, without consent and without compensation.

Indeed, the District Court Judge observed:

> " . . . it would be one thing to photograph Taggart as he went about his duties at a newsworthy event and to include such a photograph and a factual description of that event, but quite another thing to deliberately draw him out in conversation for the purpose of making him an inadvertent performer in a sequence intended to be exploited for its artistic effect." *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 438 (3rd Cir. 1973).

Subsequently, the District Court Judge granted petitioners' motion for summary judgment presumably on the basis of viewing excerpts from "Woodstock." On the hearing before the Court of Appeals for the Third Circuit, Judge Gibbons, in the majority opinion, took exception to the rationale upon which the trial court relied.

> "The difficulty with this rule (grant of summary judgment) is that it chooses between Taggart's version, that he was drawn out and made an involuntary performer, and the defendant's version, that he was a mere participant in a newsworthy event. The Court did so on the basis of the view of a part of the whole film. The sequence which he viewed was undoubtedly significant evidence in support of the defendants' position. But it was only evidence to be weighed against Taggart's deposition and the reaction of the critics. That weighing process was made before the plaintiff had had the opportunity to present his whole case and it was made by the judge in a case in which a jury trial was demanded. Whether Taggart had been drawn out as a performer rather than merely photographed as a participant in a newsworthy event is on this record at best a mixed question of law and fact. Factual determinations in a §51 (of the New York Civil Rights Law) case are for the jury . . . " 489 F.2d at 438.

In *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973), a problem similar to the case before this Court was resolved. There, plaintiff, Cary Grant, had been the subject of an article in Esquire Magazine in 1946 dealing with clothing styles. In 1971, without Mr. Grant's permission, Esquire republished the same picture with one modification: everything below Mr. Grant's neck had been replaced with the body of another man modeling a sweater-jacket. Plaintiff initiated an action wherein he claimed an invasion of privacy alleging that Esquire had no right to compel him to contribute his face to an advertisement without just and adequate compensation. The district court denied Esquire's motion for summary judgment in that the First Amendment did not preclude recovery under New York Civil Rights Law for use of plaintiff's photograph without compensation if the photograph was used for purposes of advertising or for purposes of trade. Although the Court articulated the legal problems in slightly different terms, the message of *Grant* appears to be that the First Amendment does not absolve publishers—or movie companies—from the obligation of paying their help. They are entitled to report almost any activity in which Mr. Grant might engage, but they are not entitled to appropriate his services as a professional model. Likewise in the instant case, the petitioners may be entitled to photograph newsworthy events. Nevertheless, they are not entitled to lure unsuspecting citizens into becoming uncompensated, semi-professional actors.

There are additional issues of material fact presented herein. For example, are these petitioners members of the "press" which our founding fathers sought to protect or merely entrepreneurs who exist solely for profit? Was respondent's participation in the Woodstock Festival newsworthy? If it was, why did no news media, either tele-

vision, radio or newspaper, publish a report on respondent? It is therefore respectfully submitted that a plenary trial be conducted in order to resolve these issues and establish a record upon which this Court may rely.

### B. *Respondent's action for invasion of privacy does not deter petitioners from exercising their rights to freedom of speech under the First Amendment*

The fundamental issue to be resolved by this Court is whether respondent's institution, maintenance and success of this litigation will inhibit, or tend to inhibit, petitioner in the untrammeled exercise of any right guaranteed by the First Amendment. While recognizing that courts may not impale sanctions or grant civil relief which would tend to chill or impair the exercise of First Amendment rights, *Near v. Minnesota*, 283 U.S. 697 (1931), *New York Times v. Sullivan*, 376 U.S. 254 (1964), the denial of petitioners' motion for summary judgment would not be a deterrent from the full exploitation of their rights to freedom of speech and press.

In order to avoid "chilling" these rights, it would appear that in libel actions, for instance, the Supreme Court has no desire to encourage libelous publications. However, it has concluded that it is better to allow the risk of unchecked libel than to permit any relatively slight risk of impeding public debate. In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the Court observed:

> " . . . the vital needs of freedom of the press and freedom of speech pursuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate 'breathing space' for these great freedoms. Reasonable care is an 'exclusive standard' that would place

> on the press the intolerable burden of guessing how a jury might assess reasonableness of steps taken by it . . . fear of guessing wrong must inevitably cause self-censorship and thus create the danger that a legitimate utterance will be deterred." 403 U.S. at 49-50.

Here, petitioners, under the protections afforded by our constitution and our free enterprise system, produced a film which heralded and regaled the life style of the American youth of the 1960's. There was no censorship, no restriction and clearly no impairment of First Amendment rights.

In *Grant*, Judge Knapp used the following analogy in denying Esquire Magazine's motion for summary judgment:

> "As we see it, the publisher is in no different position than a painter who feels he needs certain pigments and oils to create a contemplated masterpiece. While a more sympathetic case might be made for an impecunious painter than for an abundantly solvent publisher, nobody would seriously contend that artistic need would authorize a painter to walk into a supply store and help himself to whatever he might require." 367 F. Supp. at 883.

Petitioners contend that respondent was a participant in a newsworthy event, and cite *Time, Inc. v. Hill*, 385 U.S. 374 (1964), and *Rosenbloom, supra*, as authority for their right to make use of the film. Such reliance in these cases is misplaced. First, the doctrine of *Hill* was succinctly stated by Mr. Justice Brennan speaking for the Court:

> "We hold that the constitutional protections for speech and press preclude the application of the New York statute (Civil Rights Law §50-51) to redress false reports of matters of public interests in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." 385 U.S. at 387-388.

Applying that doctrine to the facts before it, the Court went on to observe:

> "We have no doubt that the subject of the Life article, the opening of a new play linked to actual incident, is a matter of public interest." 385 U.S. at 388.

Second, in *Rosenbloom*, the Court noted that "we also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business" 403 U.S. at 44n.12.

In the instant case, petitioners cannot contend that *Hill* and *Rosenbloom* stand for the proposition that where an involuntary participant is "deliberately drawn-out as a performer in a commercial film" the movie company is protected under the First Amendment and thus need not compensate this individual for his "performance."

> "Such a ruling would leave very little to §51 or any similar statutory or common law right of privacy . . . such a ruling, if it is to be made, should be made on a record on which the facts have been developed. Only with such a record can the necessary balance between the conflicting rights of personal privacy and of freedom of expression properly be struck." 489 F.2d at 438.

It is therefore respectfully submitted that the United States Court of Appeals for the Third Circuit has struck the proper balance between the guaranteed rights of the parties in this litigation. That balance can be stated simply: no one, under a claim of "freedom of the press," can exploit an unknowing individual in a commercially-motivated film enterprise without just compensation. By denying this Petition for Certiorari, this Court can assure the working poor of this nation, whether he be a latrine cleaner at the Woodstock Festival, a manure handler at the Ken-

tucky Derby or a lavatory attendant at a Super Bowl Game, that they can never be subject to public ridicule, humiliation and degradation because of their humble calling unless they are duly compensated therefor.

## Point II

**The doctrine of "constitutional fact" should not be invoked until there has been a plenary record of the disputed factual issues.**

The doctrine of "constitutional fact" has been expanded in recent years to encompass defamation and libel cases. *New York Times v. Sullivan*, 376 U.S. 254 (1964). In that case, this Court concluded that in cases where the line between constitutionally protected speech and regulated speech is to be drawn, [T]he rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made . . .' We must 'make an independent examination of the whole record.'" 376 U.S. at 285.

Nevertheless, neither *New York Times*, nor the other cases relied upon by Petitioner [*Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) and *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972) *cert. denied*, 403 U.S. 875 (1972)], suggest that a district court judge may resolve disputed factual issues on a motion for summary judgment. Rather, if a situation arises, as in the case *sub judice*, this Court may "make an independent examination of the whole record" 376 U.S. at 285. At the present time, a plenary review of the disputed factual issues has not been made. Thus, petitioners' motion for certiorari should be denied and this matter remanded to the United States District Court for the District of New Jersey for a trial on the merits.

## CONCLUSION

**For the reasons set forth herein, Respondent respectfully requests that the petition for writ of certiorari be denied and that the judgment of the United States Court of Appeals for the Third Circuit, reversing the judgment of the United States District Court for the District of New Jersey, be affirmed.**

FARLEY & FARLEY,
A Professional Corporation,
112 South Main Street,
Orange, New Jersey 07050

ZAZZALI & ZAZZALI,
A Professional Corporation,
17 Academy Street,
Newark, New Jersey 07102
*Attorneys for Respondent*

CHARLES J. FARLEY, JR.
JAMES R. ZAZZALI AND
LAWRENCE A. WHIPPLE, JR.
*Of Counsel and*
*On the Brief*